No. 48810-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JAMES EDWARD MITCHELL,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 14-1-02979-1
The Honorable Katherine Stolz, Judge
The Honorable G. Helen Whitener, Judge

OPENING BRIEF OF APPELLANT

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II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where the State cannot account for the handling or whereabouts of critical evidence from the time of collection until 65 days later, and where easily contaminated blood

evidence was collected and stored without precautions that are necessary to prevent contamination for the purpose of DNA testing, did the State fail to sufficiently establish the chain of custody and fail to sufficiently establish that evidence was handled and preserved in such a way as to render it improbable that the items had been tampered with or contaminated? (Assignments of Error 1, 2 & 3)

2. Did the State present sufficient evidence to prove beyond a reasonable doubt the essential element of premeditation, where the facts showed no evidence of planning or preparation, no evidence of an opportunity to reflect and deliberate, and no evidence of actual reflection and deliberation? (Assignment of Error 4)

3. Does evidence of a struggle and multiple stab wounds, without any evidence of what preceded the struggle and without any evidence of when and under what circumstnaces the murder weapon was procured, prove beyond a reasonable doubt that a murder was premeditated? (Assignment of Error 4)

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5. If the State substantially prevails on appeal and makes a request for costs, should this Court decline to impose appellate costs because James Mitchell does not have the ability to pay costs, he has previously been found indigent, and there is no evidence of a change in his financial circumstances? (Assignment of Error 6)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

James Mitchell was charged in 2014 with first degree premeditated murder for the 1993 death of Linda Robinson (RCW 9A.32.030(1)(a)). (CP 152) Before trial, Mitchell moved to suppress evidence collected at the apartment, and results of deoxyribonucleic acid (DNA) tests on that evidence, because the State failed to sufficiently establish the chain of custody. (CP 9-77,

153-58; 09/29/15 RP 303-07, 327-29)[1] The trial court denied the motion. (CP 189-94; 09/30/15 RP 369)

The jury convicted Mitchell as charged. (CP 244-45; 02/24/16 RP 1182) The trial court sentenced Mitchell to a standard range sentence of 450 months and, finding that Mitchell had no ability to pay legal financial obligations, ordered only mandatory fees. (CP 300, 302; 03/25/16 RP 1193, 1207) Mitchell timely filed a Notice of Appeal. (CP 311)

B. SUBSTANTIVE FACTS

Linda Robinson was stabbed to death in the kitchen of her Spanaway apartment on February 6, 1993. (01/25/16 RP 248) At the time of her murder, her young nieces and nephew were spending the night at her apartment, and were asleep in the living room. (01/25/16 RP 250, 272; 01/26/16 RP 313, 314-15) Her teenage daughter was out with friends at a roller skating rink. (01/25/16 RP 291)

Robinson's niece was eventually awakened by the sound of the smoke alarm. (01/26/16 RP 316) When she went to the kitchen to investigate, she found a pot of soup burning on the kitchen stove and her aunt's lifeless body lying face down on the

[1] The transcripts will be referred to by the date of the proceeding.

floor. (01/26/16 RP 320-21) She went to a neighbor and asked for help, and the neighbor called 911. (01/26/16 RP 321-22, 353-54, 362)

Robinson had what the medical examiner described as defensive wounds on her hands and forearms, and superficial cuts on her chest and torso. (02/09/16 RP 967-69, 970, 971, 973) But her death was caused by the 10 stab wounds to her back. (02/09/16 974, 977)

Medics arrived first and attended to Robinson, then several police officers and forensic investigators searched the apartment for evidence. (01/26/16 RP 407-08; 01/27/16 441, 455, 458, 475) They took samples of blood from the kitchen floor where Robinson's body was found, from a smear on the hallway wall, from droplets on the dresser in Robinson's bedroom, from the bathroom floor, and from areas of the carpet. (01/25/16 RP 199-200; 02/03/16 RP 525; 02/08/16 RP 814, 817) They also collected a telephone with a cord that appeared to have been cut or torn from the wall, and a jacket in the bedroom that appeared to have blood on it. (01/25/16 RP 197-98, 200, 01/27/16 427; 02/08/16 RP 811) Investigators noted that Robinson's pants pockets were turned out and several items were on the floor next to her leg, and her dresser

drawers were open. (01/25/16 RP 194-95, 197, 02/08/16 RP 805)

No one heard or saw the incident, and no one saw the perpetrator arrive at or leave the apartment. (01/26/16 RP 324, 377, 02/04/16 RP 636) However, Robinson's friend George Caldwell was on the telephone with Robinson around 10:30 or 11:00 that night, and their conversation ended abruptly. (02/04/16 650, 652-53) He testified that they were talking, then Robinson said, "Hold on, somebody's at the door." (02/04/16 654) He could hear Robinson talking to another person, but could not tell if the other person was male or female. (02/04/16 RP 655, 658) Caldwell testified that Robinson sounded "submissive" and said, "Okay. Okay," to the visitor. (02/04/16 RP 655) Then the phone went dead. (RP 655) Although he implied to investigators at the time that he and Robinson were romantically involved, at trial Caldwell testified that Robinson was simply his children's babysitter. (02/04/16 649, 663-65)

Investigators were unable to solve the crime and identify a suspect. (02/08/16 RP 827) But in 2013, Pierce County Sheriff Detective Tim Kobel reviewed the file, and asked to have several blood items tested for DNA profiles. (01/25/16 RP 184, 206; 02/10/16 RP 34) A forensic scientist first developed a DNA profile

for Robinson based on a known, controlled sample. (02/10/16 RP 34, 38) Then he tested blood samples taken from the bathroom, from the bedroom dresser, from the jacket, from the back of Robinson's jeans, and from the phone cord. (02/10/16 RP 44-45, 47-48, 51-52, 53, 56, 58, 60-61). Several items contained mixed DNA, with Robinson as one donor and "Individual A" as a second donor. (02/10/16 RP 47-48, 56, 59, 62-63) The blood drops on the bedroom dresser produced a single profile matching "Individual A." (02/10/16 RP 44-46) The DNA profile for "Individual A" was compared with profiles in a DNA database, and matched the profile for James Mitchell. (02/10/16 RP 50, 63-64) Detective Kobel located Mitchell in Florida. (02/10/16 RP 103)

One of Robinson's former neighbors testified that he saw Mitchell going into and out of Robinson's apartment a few times when he lived downstairs from Robinson in 1993. (02/04/16 RP 634, 638) However, at that time, Robinson was seeing several different men and was also using illegal drugs recreationally. (01/25/16 RP 281, 302; 01/27/16 467-69; 02/09/16 RP 885-86) Robinson was supposed to meet a man named Frederick Ross on the night she died. (02/18/16 RP 1033-34) And a few days before her death, Robinson told her sisters that a man named Billy called

her and was "talking crazy" and threatening to come to her apartment. (01/25/16 RP 260, 281; 01/27/16 480; 02/08/16 RP 860-61)

Mitchell testified that he knew Robinson and had seen her a few times in the month before her death. (02/18/16 RP 991-92) He stopped by her apartment to visit her the night she was killed. (02/18/16 RP 992-93) As they were talking, there was a knock on the door and Robinson answered. (02/18/16 RP 994) A man came in, acting agitated, and immediately tried to hit Robinson and Mitchell. (02/18/16 RP 995) Robinson said. "Why are you tripping? I'm tired of this shit. I'm going to call the police." (02/18/16 RP 996) But the man kept trying to fight with them. (02/18/16 RP 997)

Mitchell and the man exchanged blows. (02/18/16 RP 997) Robinson again told the man to leave, and this time he did. (02/18/16 RP 997) Mitchell followed Robinson to her bedroom. He thought he might be bleeding, but saw in her dresser mirror that he was sweating profusely. (02/18/16 RP 997-98) But he later noticed that his hand was bleeding. (02/18/16 RP 999) Mitchell decided to leave, and did not have any additional contact with Robinson. (02/18/16 RP 1000, 1024-35) Mitchell adamantly denied stabbing and killing Robinson. (02/18/16 RP 991, 1029-30)

IV. ARGUMENT & AUTHORITIES

A. THE TRIAL COURT SHOULD HAVE SUPPRESSED THE BLOOD EVIDENCE BECAUSE THE STATE FAILED TO SUFFICIENTLY ESTABLISH THE CHAIN OF CUSTODY, THE STATE COULD NOT ACCOUNT FOR THE WHEREABOUTS OF THE EVIDENCE FOR 65 DAYS, AND THE EVIDENCE WAS HANDLED AND STORED IN A WAY AS TO CREATE AN EXTREME RISK OF CONTAMINATION.

"Before a physical object connected with the commission of a crime may properly be admitted into evidence, it must be satisfactorily identified and shown to be in substantially the same condition as when the crime was committed." State v. Campbell, 103 Wn.2d 1, 21, 691 P.2d 929 (1984). Evidence that is unique and readily identifiable may be identified by a witness who can state that the item is what it purports to be. 5 Karl B. Tegland, WASH. PRAC. § 402.31 (1999). However, blood evidence, which is not readily identifiable and is susceptible to alteration by tampering or contamination, should be identified by the testimony of each custodian in the chain of custody from the time the evidence was acquired. State v. Roche, 114 Wn. App. 424, 436, 59 P.3d 682 (2002). This more stringent test requires the proponent to establish a chain of custody "'*with sufficient completeness* to render it *improbable* that the original item has either been exchanged with another or been contaminated or tampered with.'" United States v.

Cardenas, 864 F.2d 1528, 1531 (10th Cir.1989) (citing E. Cleary, McCormick on Evidence § 212 at 668 (3d ed.1984) (emphasis added)).

Factors to be considered include the nature of the item, the circumstances surrounding preservation and custody, and the likelihood of tampering or alteration. Campbell, 103 Wn.2d at 21. The proponent need not identify the evidence with absolute certainty and eliminate every possibility of alteration or substitution. Campbell, 103 Wn.2d at 21. "[M]inor discrepancies or uncertainty on the part of the witness will affect only the weight of the evidence, not its admissibility." Campbell, 103 Wn.2d at 21.

Mitchell moved prior to trial to exclude evidence collected from Robinson's apartment, and subsequent results of DNA testing of those items, arguing that the State could not sufficiently establish a chain of custody or establish that the items were properly preserved and free from contamination. (CP 9-13; 09/29/15 RP 303-08, 327-29) Hilding Johnson and Ted Schlosser were the forensic investigators who collected evidence at Robinson's apartment in 1993, and testified at a pretrial hearing on the issue. (09/24/15 RP 29-30, 106) Neither investigator had any independent recollection of the case. (09/24/15 RP 28-30, 106)

They relied on their written reports to recount what evidence they collected. (09/24/15 RP 31-35; 106; Exhs. 9-12) But their reports did not include any information about how the evidence was transported and stored from the time of collection until the time it was received at the property room. (09/24/15 RP 117, 124)

Johnson and Schlosser could only describe what their standard practice was in 1993 for collecting, transporting and storing evidence. Any items that potentially contained blood would be placed in a paper bag, which would sometimes be stapled closed. (09/24/15 RP 50-51) Items deemed to have evidentiary value would be photographed with a numbered placard next to it, then the item and the placard would be packaged together. (09/24/15 RP 36)

Generally, whoever collected the evidence at the scene would place it into a van and take it back to the forensic lab. (09/24/15 RP 36, 58) The forensic lab is located in the City-County Building, and is not accessible to the public unless escorted by a lab employee. (09/24/15 RP 60, 62-63, 112; 09/28/15 RP 151)

Once at the lab, any wet or blood-soaked items would be placed into a drying room (along with items from other cases), and the remainder of the evidence would be placed in a locker.

(09/24/15 RP 58-59, 111, 118; 09/28/15 RP 151, 167, 170, 175) The responsible investigator would keep the key to the locker. (09/24/15 RP 58, 109) At the time, there was no system for tracking what items were in the lockers and what items were in the drying room. (09/28/15 RP 152, 166) After the evidence was logged and processed, it would be taken to the property room, where it would again be logged and securely stored. (09/24/15 RP 58-59, 79)

Furthermore, although the evidence in this case was collected on February 7, 1993, the items were not delivered to the property room until April 12, 1993. (09/24/15 RP 39-40, 109; CP 191) Neither Johnson nor Schlosser recall delivering the items to the property room. (09/28/15 RP 165-66, 172-73) Nothing in the forensic reports or files indicates exactly where and how the evidence was stored during those 65 days, or whether any detectives or other lab workers opened and viewed the evidence. (09/24/15 RP 79, 86-88, 123; 09/28/15 RP 173, 169-70, 190; CP 191-92)

Furthermore, Robinson's body was taken to the medical examiner's officer for an autopsy on February 7, 1993. (CP 191) Four days later, an officer delivered her blood-covered jeans and

vials of her blood to the property room. (09/28/15 RP 233; CP 191-92) That officer did not testify at the hearing, and there was no testimony describing how the jeans were stored or protected from contamination during those four days.

Steven Wilkins, who managed the forensic lab in 1993, testified that the lab employed seven investigators, three technicians, and four assistants at that time. (09/28/15 RP 140) He acknowledged that collection and storage procedures were quite different in 1993 than they are now, because they were not yet aware of the potential for DNA testing and were not concerned with preserving the integrity of the items for future DNA tests. (09/28/15 RP 142) He acknowledged that "DNA is everywhere" and the potential for contamination is high if steps are not taken to prevent it. (09/28/15 RP175)

Because this incident occurred before DNA testing, when forensic scientists could only test for blood types, there was no thought of preventing contamination of potential DNA evidence. (02/03/16 RP 501-02, 503, 504; 02/04/16 RP 682-83; 02/08/16 RP 808-09) For example, none of the personnel who entered the apartment wore booties on their shoes or hairnets on their heads to avoid tracking in DNA from outside sources, and paper number

placards that were handled by investigators were put into bags with the bloody items. (02/03/16 RP 508-09, 564-65; 02/04/16 RP 682, 703)

Finally, Wilkins testified that items with blood on them would be packaged in paper bags and only stapled closed. (09/28/15 RP 150) The bags were not securely sealed because the property room staff would open the bags and independently inventory the evidence to make sure that each item matched its description before securing the items. (09/28/15 RP 150, 196)

Nevertheless, the trial court denied Mitchell's motion, finding that the State had adequately established the chain of custody and that any holes in the chain amounted to "minor discrepancies." (CP 09/30/15 RP 369; CP 192-93) The trial court's determination of admissibility is reviewed for abuse of discretion. Campbell, 103 Wn.2d at 21 (citing Kiessling v. Northwest Greyhound Lines, Inc., 38 Wn.2d 289, 295, 229 P.2d 335 (1951)).

The trial court abused its discretion in this case because the inability to account for the handling or even the whereabouts of the evidence for 65 days, and the complete lack of effort to prevent contamination by first responders, investigators, other drying room evidence, lab staff or property room staff, cannot be considered a

"minor discrepancy." It instead undermines the foundational requirement needed to admit the evidence at trial. To allow the State to avoid the chain of custody requirement as it did in this case, and to allow the State to present blood and DNA evidence where there are no assurances that the evidence was properly preserved and uncontaminated, eliminates the evidentiary safeguards designed to protect the accused's right to due process. State v. Neal, 144 Wn.2d 600, 607-08, 610-11, 30 P.3d 1255 (2001).

This evidence should not have been admitted. The State did not establish chain of custody and storage procedures sufficient to render it improbable that the items were tampered with or contaminated. The State failed to meet its burden of establishing the chain of custody for the blood evidence, or that the evidence was in substantially the same condition as when the crime was committed. The trial court abused its discretion when it allowed the State to present the evidence and DNA test results to the jury. This evidence should have been excluded, and Mitchell's conviction should be reversed.

B. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT THE PERPETRATOR ACTED WITH PREMEDITATED INTENT TO CAUSE ROBINSON'S DEATH.

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201.

The jury convicted Mitchell of first degree murder pursuant to RCW 9A.32.030(1)(a), which requires that the State prove "a premeditated intent to cause the death of another." Accordingly, the State is required to prove both intent and premeditation, which are not synonymous. State v. Brooks, 97 Wn.2d 873, 876, 651 P.2d 217 (1982).

While intent means only "'acting with the objective or purpose to accomplish a result which constitutes a crime'", premeditation involves "'the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.'" State v. Pirtle, 127 Wn.2d 628, 644, 904 P.2d 245 (1995) (quoting State v. Gentry, 125 Wn.2d 570, 597-98, 888 P.2d 1105 (1995) and State v. Ortiz, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992)); Brooks, 97 Wn.2d at 876. Premeditation requires a "conscious consideration and planning that precedes an act [or] the pondering of an action before carrying it out." PREMEDITATION, Black's Law Dictionary (10th ed. 2014).

Thus, premeditation must involve "more than a moment in point of time," and mere opportunity to deliberate is not sufficient to support a finding of premeditation. RCW 9A.32.020(1); Pirtle, 127 Wn.2d at 644. It is therefore possible for a person to act with an intent to kill that is not premeditated. Brooks, 97 Wn.2d at 876. For this reason, premeditation cannot simply be inferred from the intent to kill. State v. Commodore, 38 Wn. App. 244, 247, 684 P.2d 1364 (1984).

In State v. Ortiz, the Court found sufficient evidence of premeditation from the defendant's infliction of multiple wounds,

procurement of a weapon from another room, and his prolonged struggle with the victim. 119 Wn.2d at 312-13. In State v. Rehak, premeditation was proved where there was evidence showing that the killer "prepared the gun; crept up behind the victim who was sitting quietly in his chair and not in a confrontational stance; and shot three separate times, twice after the victim had already fallen to the floor." 67 Wn. App. 157, 164, 834 P.2d 651 (1992).

Conversely, in State v. Bingham, an autopsy of the victim indicated that the "cause of death was 'asphyxiation through manual strangulation', accomplished by applying continuous pressure to the windpipe for approximately 3 to 5 minutes." 105 Wn.2d 820, 822, 719 P.2d 109 (1986). The State relied on the length of time required to cause death to support the charge of premeditated murder. 105 Wn.2d at 822. However, on appeal the Court found that "no evidence was presented of deliberation or reflection before or during the strangulation, only the strangulation. The opportunity to deliberate is not sufficient." 105 Wn.2d at 827.

In urging the jury to convict Mitchell, the State argued that the perpetrator "intended to do violence to Linda when he walked up those stairs, when he knocked on that door[,]" and that "[e]very step that he took up that staircase, every step to that doorway and

when he knocked, knowing what was about to happen, that's premeditation." (02/22/16 RP 1099, 1145) There was, however, no evidence that the perpetrator "knew what was about to happen." There was no evidence that the perpetrator arrived with the intent to kill Robinson. There was no evidence that the perpetrator arrived while armed with a knife. There was no evidence that the altercation began immediately upon his arrival, or that the perpetrator even instigated the altercation. There was, quite simply, no evidence that the perpetrator deliberated and planned to kill Robinson.

The State may rely on the fact of a struggle and multiple stab wounds to support the element of premeditation. But this argument fails as well.

> "[V]iolence and multiple wounds, while more than ample to show an intent to kill, cannot standing alone support an inference of a calmly calculated plan to kill requisite for premeditation and deliberation, as contrasted with an impulsive and senseless, albeit sustained, frenzy."

State v. Ollens, 107 Wn.2d 848, 852, 733 P.2d 984 (1987) (quoting Austin v. United States, 382 F.2d 129, 139 (D.C.Cir.1967)).

The State must present some evidence that the perpetrator actually reflected and deliberated and formed a reasoned plan to

take Robinson's life. The State failed to offer this evidence. The facts presented cannot sustain a finding that the perpetrator formed a premeditated intent to kill Robinson, and Mitchell's first degree murder conviction must be reversed.[2]

C. MITCHELL'S 1983 FLORIDA ROBBERY CONVICTION IS NOT COMPARABLE TO A WASHINGTON ROBBERY.

Out-of-state convictions are included in a Washington defendant's offender score if the foreign crime is comparable to a Washington felony offense. RCW 9.94A.525(3). Martin argued at sentencing that his 1982 Florida armed robbery conviction was not comparable to a Washington robbery, and should not be counted in his offender score calculation. (CP 267-27; 03/25/16 RP 1191-93) The trial court found that it was comparable, and sentenced Mitchell using an offender score of eight. (03/25/16 RP 1193; CP 299)

To determine if a foreign crime is comparable to a Washington offense, the court must first look to the elements of the crime. RCW 9.94A.525(3); State v. Morley, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998); In re Pers. Restraint of Lavery, 154

[2] The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1988); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

Wn.2d 249, 255-58, 111 P.3d 837 (2005). The elements of the out-of-state crime must be compared to the elements of Washington criminal statutes in effect when the foreign crime was committed. Morley, 134 Wn.2d 588, 606. If "the elements of the foreign offense are substantially similar to the elements of the Washington offense," then the foreign offense is legally comparable. State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007).

In 1983, the crime of robbery was defined in RCW 9A.56.190 as follows:

> A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

A person would be guilty of second degree robbery if they committed a robbery. RCW 9A.56.210 (1983). The crime was elevated to first degree robbery if the individual was armed with a deadly weapon or displayed what appeared to be a deadly weapon, or inflicts bodily injury. RCW 9A.56.200 (1983).

Mitchell was convicted under Florida's armed robbery statute, Florida Statutes Annotated (FSA) 812.13(2)(a). (Exh. P1) In 1983, Florida defined robbery as "the taking of money or other property which may be the subject of larceny from the person or custody of another by force, violence, assault, or putting in fear. FSA 812.13(1) (1983). The Florida statute further provided that "if in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony in the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment." FSA 812.13(2)(a) (1983).

The Florida and Washington statutes differ in significant ways. Washington requires the taking of property from the person or in their "presence," while Florida only requires the taking from the person or their "custody." The term "custody" does not necessarily require ones "presence."[3] Additionally, Washington requires that the force or threat of force be used to obtain or retain possession, or to prevent or overcome resistance to the taking, while Florida has no such requirement. So by its plain terms, the Florida statute

[3] "Custody is defined as 'care, supervision, and control exerted by one in charge.'" See Gaiter v. State, 824 So. 2d 956, 957 (Fla. Dist. Ct. App. 2002) (quoting THE AMERICAN HERITAGE DICTIONARY (3d ed.1996)) (interpreting FSA 812.13).

is broader than the Washington statute.

Because the Florida armed robbery conviction and the Washington robbery statute are not legally comparable, the Court may look to the defendant's conduct to determine whether the conduct would have violated the comparable Washington statute. Morley, 134 Wn.2d at 606; State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). But the elements of the charged crime remain the cornerstone of the comparison because facts and allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven at trial. Morley, 134 Wn.2d at 606; RCW 9.94A.525(3).

Here, the facts contained in the Florida documents are not sufficient to establish a factual basis for comparability. The State presented the Information and the Judgment showing that Mitchell was charged with, and subsequently entered a guilty plea to, the crime of armed robbery. The information alleged:

> [T]hat JAMES E. MITCHELL and ROY D. CHRISTIAN and NEIL RENARD BROWN, on the 25th day of October, 1983, in said County and State, did, in violation of Florida Statute 812.13(2)(a), by force, violence, assault or putting in fear, take away from the person or custody of CHRISTOPHER A. DEGRAFF, certain property, to-wit: a room key, and a wallet containing UNITED STATES MONEY CURRENT, the property of CHRISTOPHER A. DEGRAFF, as owner

> or custodian thereof, with the intent to permanently deprive the said owner or custodian of the property, and in the course of committing the robbery, the said JAMES E. MITCHELL and ROY D. CHRISTIAN and NEIL RENARD BROWN did carry a firearm or other deadly weapon, to-wit: knives.

(Exh. P1) The State did not submit a declaration of probable cause or police report, or any other documents that described the facts of the crime.

The documents submitted do not establish that the offense was committed in the victim's presence or that the force or threat was used to take or retain the property. Thus, the State did not establish that the Florida offense is factually comparable.

The Washington Supreme Court has repeatedly reiterated that it is the use of force, or the fear that force will be used to obtain or retain the stolen property or overcome the resistance to the taking, which distinguishes robbery from simple theft or larceny. See State v. Handburgh, 119 Wn.2d 284, 292, 830 P.2d 641 (1992). Accordingly, the only possible offense for comparability is theft under RCW 9A.56.020: "to wrongfully exert unauthorized control over the property or services of another or the value thereof, with the intent to deprive him of such property or services[.]" And, because the Florida documents do not specify a value of the

property taken, the only possible degree for a comparable crime is found at RCW 9A.56.050, which defines the offense of theft in the third degree as theft of property which does not exceed $250.00. Theft in the third degree is a gross misdemeanor, and therefore would not count in Mitchell's offender score. See RCW 9.94A.525.

The trial court clearly erred when it counted the Florida conviction in Mitchell's offender score, and Mitchell's case should be remanded for resentencing with a corrected score.

D. ANY FUTURE REQUEST FOR APPELLATE COSTS SHOULD BE DENIED.[4]

Under RCW 10.73.160 and RAP Title 14, this Court may order a criminal defendant to pay the costs of an unsuccessful appeal. RAP 14.2 provides, in relevant part:

> A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.

But imposition of costs is not automatic even if a party establishes that they were the "substantially prevailing party" on review. State

[4] Recently, in State v. Sinclair, Division 1 concluded "that it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant's brief." 192 Wn. App. 380, 389-90, 367 P.3d 612 (2016). Mitchell is including an argument regarding appellate costs in his opening brief in the event that this Court agrees with Division 1's interpretation of RAP 14.2.

v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). In Nolan, our highest Court made it clear that the imposition of costs on appeal is "a matter of discretion for the appellate court," which may "decline to order costs at all," even if there is a "substantially prevailing party." Nolan, 141 Wn.2d at 628.

In fact, the Nolan Court specifically rejected the idea that imposition of costs should occur in every case, regardless of whether the proponent meets the requirements of being the "substantially prevailing party" on review. 141 Wn.2d at 628. Rather, the Court held that the authority to award costs of appeal "is permissive," so that it is up to the appellate court to decide, in an exercise of its discretion, whether to impose costs even when the party seeking costs establishes that they are the "substantially prevailing party" on review. Nolan, 141 Wn.2d at 628.

Should the State substantially prevail in Mitchell's case, this Court should exercise its discretion and decline to award any appellate costs that the State may request. First, Mitchell owns no property or assets, has no savings, and has no job and no income. (CP 313-14) Mitchell will be incarcerated for the next 37 years. (CP 302; 03/25/16 RP 1207) And the trial court declined to order any non-discretionary LFOs at sentencing in this case after finding

that Mitchell was unlikely to have the ability to repay such costs. (03/25/16 RP 1207; CP 300) Thus, there was no evidence below, and no evidence on appeal, that Mitchell has or will have the ability to repay additional appellate costs.

Furthermore, the trial court found that Mitchell is indigent and entitled to appellate review at public expense. (CP 317-18) This Court should therefore presume that he remains indigent because the Rules of Appellate Procedure establish a presumption of continued indigency throughout review:

> A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

In State v. Sinclair, Division 1 declined to impose appellate costs on a defendant who had previously been found indigent, noting:

> The procedure for obtaining an order of indigency is set forth in RAP Title 15, and the determination is entrusted to the trial court judge, whose finding of indigency we will respect unless we are shown good cause not to do so. Here, the trial court made

> findings that support the order of indigency.... We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve. ... We therefore presume Sinclair remains indigent.

192 Wn. App. 380, 393, 367 P.3d 612 (2016). Similarly, there has been no evidence presented to this Court, and no finding by the trial court, that Mitchell's financial situation has improved or is likely to improve. Mitchell is presumably still indigent, and this Court should decline to impose any appellate costs that the State may request.

V. CONCLUSION

The State did not sufficiently establish the chain of custody of the blood evidence and was unable to show that the items had not likely been contaminated. This evidence should have been suppressed. The State also did not establish beyond a reasonable doubt that the person who murdered Robinson acted with premeditated intent. For these reasons, Mitchell's conviction must be reversed. Alternatively, Mitchell's Florida robbery conviction is not comparable to a Washington robbery and should not have been counted in his offender score, and Mitchell should be resentenced. Lastly, this Court should decline any future request to impose

appellate costs.

DATED: November 4, 2016

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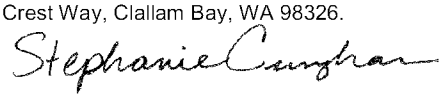
Attorney for James E. Mitchell

CERTIFICATE OF MAILING

I certify that on 11/04/2016, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: James E. Mitchell, DOC# 731240, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.



STEPHANIE C. CUNNINGHAM, WSBA #26436

CUNNINGHAM LAW OFFICE

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